IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. ~~78~~ 78-5283

xxxxx

JAMES A. JACKSON,

Petitioner

versus

COMMONWEALTH OF VIRGINIA
and
R. ZAHRADNICK, Warden,

Respondent

xxxxx

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

xxxxx

Carolyn J. Colville
Court-appointed Counsel for
Petitioner at the Fourth
Circuit Court of Appeals
Colville and Dunham
2 North First Street
Richmond, Virginia 23219
(804)782-9571

INDEX

TABLE OF AUTHORITIES

Cases:

Other Authorities:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO._____

xxxxx

JAMES A. JACKSON,

Petitioner

versus

COMMONWEALTH OF VIRGINIA
and
R. ZAHRADNICK, Warden,

Respondent

xxxxx

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, James A. Jackson, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered August 3, 1978.

OPINION BELOW

The Court of Appeals entered its opinion on August 3, 1978. A copy of that opinion, reversing the District Court, is attached as Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1). The Petitioner is an inmate of the Virginia Correctional System, avows that he is held in custody in violation of the Constitution and that his

Petition for Writ of Habeas Corpus in challenging his conviction should be granted.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals for the Fourth Circuit erred in finding "some" evidence of premeditation thereby denying Petitioner his due process rights?

2. Whether the Court of Appeals for the Fourth Circuit erred in denying the writ of habeas corpus on the basis of the rule in Thompson v. City of Louisville, 362 U.S. 199 (1960) thereby denying Petitioner his due process rights?

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law ....

STATEMENT OF THE CASE

The Petitioner was convicted of first degree murder in the Circuit Court of Chesterfield County, Virginia on March 27, 1975 and was sentenced to 30 years in prison. His conviction subsequently was appealed unsuccessfully to the Supreme Court of Virginia on February 10, 1976. As a result of the denial of the grounds of appeal by that court, Petitioner filed a Petition for a Writ of Habeas Corpus in the United States District Court for the Eastern District of Virginia on June 18, 1976. The Honorable D. Dortch Warriner ordered that a Writ of Habeas Corpus be issued and a new trial be commenced within sixty days from the entry of the Order on October 1, 1976. In a memorandum filed on that same day the Court found that there was a lack of evidence showing the element of

premeditation required for a conviction of murder in the first degree. The Respondents appealed that decision to the United States Court of Appeals for the Fourth Circuit. The case was docketed as 77-1205. In a per curiam opinion dated August 3, 1978, the Fourth Circuit reversed the order of the District Court.

A statement of the facts of this case which are material to a consideration of the questions presented would be as follows with references to the Appendix filed with the United States Court of Appeals for the Fourth Circuit indicated as "(A.____)."

The Petitioner first met the deceased, Mrs. Mary Cole [hereinafter Mrs. Cole], a cook for the Chesterfield County Jail when he was an inmate of the jail. [A.75]. Upon his release Mrs. Cole befriended him, with some indication that she wished him to stay with her. Contrary to this desire the Petitioner arranged to stay with Mrs. Cole's son Curtis and his family. [A.64]. Apparently the Petitioner and Mrs. Cole met one another on several occasions during the approximately one month period that he stayed with the Curtis Cole family.

Between 5:30 and 6:00 p.m., of the day of Mrs. Cole's death she drove to her son's home and picked up the Petitioner. [A.46]. By this time of day the Petitioner had already drank several bottles of liquor and had purchased an additional twelve cans of beer. According to the testimony of Curtis Cole, Jackson was "pretty well loaded." [A.70]. Mrs. Cole had also been drinking beforehand.

The two drove to a diner where they were observed by three police officers. One of the three, a deputy sheriff, observed a revolver sticking out of Jackson's pants. The deputy sheriff testified that the Petitioner at this time "was in a pretty rough condition," [A.80] and that both were "loaded." [A.86].

Once outside the deputy asked to see the gun, a .38 caliber revolver, used by the Petitioner in target practice with Curtis Cole earlier that afternoon. [A.49]. The deputy examined the gun and asked if he could keep it until the Petitioner had sobered. [A.86]. Apparently when Mrs. Cole said that they were going straight home, the deputy returned the gun to the Petitioner and did not confiscate Mrs. Cole's butcher knife seen in the front seat of the car. [A.82]. As the two were leaving the diner, the Petitioner told the deputy that they were planning some form of sexual activity and Mrs. Cole smiled and laughed. [A.87]. From that point onward the facts are based on a statement later given by the Petitioner to the police.

Before driving away from the diner, he and Mrs. Cole exchanged words which led to Mrs. Cole trying to stab the Petitioner with her butcher knife with words to the effect that if she could not have him then no other woman would have him. The Petitioner explained that the argument centered on his refusal to have sex with Mrs. Cole. He pushed her away and struck her on the back of the head with the butt of the revolver. The Petitioner said that when he then left the car and crossed the street to call a cab, Mrs. Cole drove up and persuaded him to get in the car again. From there Mrs. Cole drove to a secluded church where, according to the Petitioner, the two of them began "messing around." In this period of time together, the Petitioner reported that he drank a fifth of Old Crow, a fifth of Wild Turkey, and a pint of _____. Mrs. Cole apparently helped him drink both the whiskey, and an undetermined amount of beer. [A.106].

At the church Mrs. Cole again sought sexual relations, which the Petitioner refused. With both of them now outside the car, Mrs. Cole, naked from the waist down, picked up the butcher knife and tried to stab him. He fired the revolver

into the ground six times to warn her away, and then reloaded. Mrs. Cole threw down the knife and tried to wrest the gun away from him. [A.104]. In the ensuing scuffle two shots were fired killing Mrs. Cole. [A.119].

The Petitioner fled to Fayetteville, North Carolina in Mrs. Cole's car. He went to Florida and later returned to Fayetteville where he was arrested and returned to Chesterfield County, Virginia.

REASONS FOR GRANTING THE WRIT

Under the rationale of Thompson v. City of Louisville, 362 U.S. 199 (1960), the due process question turns upon the absence of "some" evidence to support each element of the offense. The Petitioner claims that his conviction of murder in the first degree was unsupported by any evidence of premeditation, a necessary element of murder of the first degree in Virginia, and thus he was deprived of his due process right. Va. Code Ann. § 18.2-32.

The one central fact that permeates the pages of the transcript is that the Petitioner was extremely intoxicated at the time of the killing. This conclusion can be gleaned from the testimony of a wide variety of witnesses whose integrity and judgment have never been questioned. Witnesses who testified to this fact included the daughter-in-law of the deceased, the son of the deceased, and more important in terms of time, Deputy Sheriff Andrews. Between 6:00 and 7:00 p.m. the deputy observed the two at the diner and became so concerned with the Petitioner's physical state that he advised the deceased to drive the car rather than allowing him to do so since the latter was "too drunk" to drive. [A.86].

Mr. Daniels, the attorney appointed to represent the Petitioner at the trial court level, referred to the laboratory report of the Chief Medical Examiner. This report introduced

into evidence by the Commonwealth, apparently showed that at the time of her death, the deceased had blood alcohol of 0.17%.

The American Medical Association and the National Safety Council adopted the following policy statement in regard to the alcohol level in the bloodstream:

> 'Blood alcohol of 0.10% can be accepted as prima facie evidence of alcoholic intoxication.' [A. Moenssens, R. Moses & F. Inbau, Scientific Evidence in Criminal Cases, 238 (1973)].

Therefore, if Mrs. Cole had at the time of her death a blood alcohol level well in excess of that level deemed to indicate intoxication, then surely the Petitioner was at least as intoxicated as she. This can be inferred from the testimony of the deputy when he stated that "[t]hey had been drinking, I would say Mr. Jackson had more than Mrs. Cole, it appeared to be that way." [A.80]. It is thus safe to say that the Petitioner, after drinking the entire day, was plainly very intoxicated at the time of the killing.

It is a matter of basic hornbook law, long held to be true in the State of Virginia, that a mind may be so bewildered from intoxicating beverages as to be entirely incapable of deliberation. Cody v. Commonwealth, 180 Va. 449, 23 S.E.2d 122 (1943); Drinkard v. Commonwealth, 165 Va. 799, 183 S.E. 251 (1936); Little v. Commonwealth, 163 Va. 1020, 175 S.E. 767 (1934); Gills v. Commonwealth, 141 Va. 445, 126 S.E. 51 (1925); Johnson v. Commonwealth, 135 Va. 524, 115 S.E. 673 (1923); Honesty v. Commonwealth, 81 Va. 283 (1886); Willis v. Commonwealth, 73 Va. (32 Gratt.) 929 (1879); Boswell v. Commonwealth, 61 Va. (20 Gratt.) 860 (1871); 40 Am. Jur. 2d Homicide §§ 128, 129 (1968); 22 C.J.S. Criminal Law § 68 (1961); 9 Michie's Jurisprudence Homicide § 23 (1950); 10A Va. and W. Va. Digest Homicide § 28 (1972). Therefore, one in this state is incapable of premeditated killing even though the intoxication is voluntarily induced. From all the evidence, it is

apparent that the Petitioner was in such a state of intoxication that he was incapable of a premeditated killing.

The decision of the United States Court of Appeals for the Fourth Circuit at page 9, states that it had no power to reconsider the bits of pieces upon which the trial judge based his ultimate finding that there was insufficient evidence of intoxication. It is respectfully submitted that that is the duty of the court when the discussion of intoxication is so significant to the entire issue of premeditation.

Admittedly the events at the death scene sound bizarre as related by a man whose intoxication at the time was substantial. Seemingly the statement given by Jackson shows two individuals in a drunken stupor who quarreled over whether they would have sexual relations. A knife appeared and then a gun. Mrs. Cole was shot twice.

The Appeals Court put great weight on the argument that one shot might have been fired accidentally, but not two. This conclusion would be much more acceptable if there was evidence showing that the .38 revolver was not an automatic. Certainly then deliberation would have been necessary to fire the gun the second time. However, no such evidence can be found in the record and therefore any conclusion that the firing of two shots proves "some" evidence of premeditation is unwarranted. All the records shows is that a struggle ensued with two shots fired. Certainly if one is so intoxicated as to be entirely incapable of deliberation, the number of shots, whether one or two, is irrelevant. It is submitted that the lack of evidence showing premeditation has deprived the Petitioner his liberty without due process of the law.

Even if this Court should find that there is "some" evidence of premeditation in the record, serious doubts have arisen over whether this finding is sufficient to deny the writ of habeas corpus in light of the holding in In re Winship,

397 U.S. 358 (1970). In that case the Court held at p.364 that

> the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

This protection would become meaningless as applied to this case where "some" evidence of premeditation might exist but no rational trier of fact could have found the Petitioner guilty beyond a reasonable doubt of the first degree murder of Mrs. Cole. In this case it is submitted that the Petitioner was convicted of first degree murder solely on the basis of inflammatory photographs.

Evidence introduced for the Commonwealth included several black and white, and one color, photographs of the body of the deceased at the discovery site. The Court, in hearing final arguments from both the Commonwealth and the Defense, began to propound on behalf of a conviction for murder in the first degree. When the defense insisted that intoxication mitigated any specific intent to commit premeditated murder, the Honorable Judge Ernest P. Gates replied, referring to the photographs of the semi-nude body of Mrs. Cole.

> The Court: Did you see the picture of her face and the mutilation? [A.129]
>
> The Court: Take a look at that picture again. To me it is a very horrible looking picture. [A.129].
>
> The Court: Look at the face. [A.129].
>
> The Court: Look where she was shot. [A.130].

The photographs, while not pleasant, could in no way be interpreted as prima facie evidence of premeditation. The autopsy report states that the body was decomposing when found. Rodent and insect marks were visible on the face, hands, arms, shoulders, and right great toe. [A.143]. The "horrible looking picture" noted by Judge Gates obviously referred to the color

photograph taken when the body was turned over from its face-down position. The natural state of decomposition, plus the insect and rodent markings on the face, doubtlessly had an emotional impact upon the Court. The Court extrapolated conclusions from the photographs which were contrary to all the evidence as produced by the coroner's examination.

The mere fact that a judge, rather than a jury, convicted the Petitioner should not change the fact that no rational trier of fact could have found the Petitioner guilty beyond a reasonable doubt of the first degree murder of Mrs. Cole. As such, the Petitioner was denied due process of the law.

The Petitioner urges this Court to adopt the reasoning of Justice Stewart in his dissent to the denial of certiorari in Freeman v. Zahradnick, 429 U.S. 1111, 1112-1113 (1977) when he argued that:

> [i]f, after viewing the evidence in the light most favorable to the State cf. Glasser v. United States, 315 U.S. 60, 80, a federal court determines that no rational trier of fact could have found a defendant guilty beyond a reasonable doubt of the state offense with which he was charged, it is surely arguable that the court must hold, under Winship, that the convicted defendant was denied due process of law.

The Constitution requires that a person is protected against conviction except upon proof beyond a reasonable doubt. If a Court fails to determine whether the evidence is sufficient, it would be abrogating its duty in the case of a Petition for Writ of Habeas Corpus to decide whether the Petitioner's incarceration is in violation of federal constitutional law. It is respectfully submitted that the United States Court of Appeals for the Fourth Circuit failed to do so under the mistaken belief that it could act only if there was no evidence of premeditation. A mistake was made by the Fourth Circuit when it applied the rule of Thompson v. City of Louisville,

supra, when it should have applied the more recent principles of In re Winship, supra.

CONCLUSION

For the above-stated reasons, the Petitioner, James A. Jackson, prays this Court issue a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

Carolyn J. Colville
CAROLYN J. COLVILLE
Court-appointed Counsel for
Petitioner at the United
States Court of Appeals
for the Fourth Circuit
Colville and Dunham
2 North First Street
Richmond, Virginia 23219
(804)782-9571

UNPUBLISHED

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 77-1205

James A. Jackson,

Appellee,

versus

Commonwealth of Virginia,
and
R. Zahradnick, Warden;
Anthony F. Troy, Attorney
General of Virginia,

Appellants.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. D. Dortch Warriner, District Judge.

Argued October 3, 1977 Decided: August 3, 1978

Before HAYNSWORTH, Chief Judge, WINTER and WIDENER, Circuit Judges

---

Linwood T. Wells, Jr., Assistant Attorney General (Anthony F. Troy, Attorney General of Virginia on brief) for Appellant; Carolyn J. Colville (Tracy Dunham, Colville and Dunham on brief) for Appellee.

PER CURIAM:

The district court granted habeas relief to this state prisoner on the ground that his state court conviction of first degree murder was unsupported by any evidence of premeditation. The district court recognized the rule that the due process question does not require an appraisal of the sufficiency of the testimony to support a finding of guilt beyond all reasonable doubt, but that the answer turns upon the presence or absence of "some" evidence to support each element of the offense. The district court concluded there was no evidence to support a finding of premeditation. We take a different view of the facts and reverse.

Jackson had met the victim, Mrs. Cole, when he was confined in a local jail in Virginia and she was a cook in the jail's kitchen. When he was released from jail, she befriended him. Indeed, there were indications that she wished him to move into her home with her, but Jackson arranged to move into the home of her son, Curtis Cole.

Late in the afternoon of the day of the homicide, Mrs. Cole drove her automobile to the home of her son, and Jackson went out of the house to join her in her car. Apparently, the two talked of a trip to North Carolina, for they called Curtis Cole out of the house to ask him if he would go, too. He declined, and indicated that his mother then changed her mind. Curtis Cole left the two talking in the car, and Mrs. Cole called to him shortly to say that she and Jackson were going to a diner.

Both Jackson and Mrs. Cole had been drinking, and Jackson had a .38 caliber revolver with which he had been engaged in target practice earlier in the afternoon. There was a butcher knife belonging to Mrs. Cole on the front seat, but everything seemed amicable between them.

While seated in the diner, they encountered a deputy sheriff who observed the revolver that Jackson was wearing and the fact that he seemed too much under the influence of whiskey to be driving. The deputy asked to be given possession of the revolver until Jackson was sober. Mrs. Cole told him of the butcher knife on the front seat of her car, but

insisted that they were "going straight home," and the deputy contented himself with hastening their departure without taking possession of either the revolver or the knife. As they parted, Jackson told the deputy that he and Mrs. Cole were planning some sexual activity, provoking giggles from Mrs. Cole. According to a statement given by Jackson to police and admitted in evidence at the trial, before driving away from the diner Mrs. Cole told Jackson that she wanted to have sex with him. Jackson said that he refused, whereupon Mrs. Cole attempted to stab him with her knife, saying that if she could not have him no other woman would. Jackson said he pushed her away and hit her on the back of the head with the butt of the revolver. The autopsy report showed a small laceration on the back of her head.

Jackson said he then left the car, crossed the street and called for a taxicab. While waiting for the cab, Mrs. Cole drove up and persuaded him to reenter her car. She then drove to a quiet, secluded church yard. There, according to Jackson, the two began "messing around," and the clothing from the lower portions of Mrs. Cole's body was removed. Standing outside the automobile, according to Jackson, Mrs. Cole

again sought sexual relations, and upon Jackson's declination, she again undertook to attack him with the butcher knife. To warn her away, Jackson said that he fired his revolver into the ground six times, emptying it. He then said that he broke the revolver open, emptying the six shell casings on the ground, which police officers later found, and reloaded his revolver. He said that when the revolver was reloaded, Mrs. Cole sought to wrest the pistol from him, and that during the scuffle the pistol accidentally discharged, killing Mrs. Cole.

Jackson then fled in her car to Fayetteville, North Carolina, leaving Mrs. Cole where she lay, her slacks beneath her body. A young woman attempted to sell Mrs. Cole's automobile, and Jackson went to Florida. Upon his return from Florida to Fayetteville, he was arrested because of the attempted disposition of the automobile. His statement to the policemen was made as he was being transported from Fayetteville, North Carolina back to Chesterfield County, Virginia.

If the trier of fact was bound to accept Jackson's statement of an accidental discharge of the revolver as the two struggled for possession of it, there would be no basis for a finding of premeditation

on his part. Jackson's story is full of internal inconsistency, however. According to his statement, Mrs. Cole stood idly by with a butcher knife in her hand as Jackson ejected the empty shell casings and reloaded his revolver. Only then did she drop the butcher knife and attempt to seize the gun. More significantly, perhaps, she was shot not once but twice. One bullet passed through her left breast from left to right, while the fatal bullet passed through her left chest and back, the spent bullet lodging itself in the interior of Mrs. Cole's automobile. That a single shot might have been fired accidentally may be believable, but that a second was fired accidentally after Mrs. Cole had already been struck once is incredible.

While premeditation is an essential element of the offense of first degree murder, the rule in Virginia is that it need not exist for an appreciable period of time. The requirement is met if the necessary intention exists immediately before the fatal blow is struck.[1] The fact that Jackson reloaded his revolver, the fact that he was so unthreatened by Mrs. Cole that

---

1. Hairston v. Commonwealth, 217 Va. 429, 230 S.E.2d 626 (1975); Akers v. Commonwealth, 216 Va. 40, 216 S.E.2d 28 (1975); Shiflett v. Commonwealth, 143 Va. 609, 130 S.E. 777 (1925).

he had sufficient time within which to do it, and the fact that she was shot twice together constitute some evidence of an intention on his part to shoot her.

In Virginia, extreme intoxication may suffice to negate premeditation. There was evidence that Jackson had much to drink, as had Mrs. Cole, but the trier of fact was warranted in finding that Jackson was not so intoxicated as to negate premeditation. The deputy sheriff at the diner thought that Jackson had had too much to drive an automobile, but he did not think Mrs. Cole so intoxicated. Nor did he think Jackson so drunk that he should not be allowed to leave in possession of his weapon.

Whether the judge, to whom the case was tried without a jury, was warranted in finding that there was premeditation beyond a reasonable doubt, we need not consider.[2] One Justice of the Supreme Court has suggested that the rule of Thompson v. City of Louisville, establishing the rule that a federal court in a habeas

---

2. Thompson v. City of Louisville, 362 U.S. 199 (1960); Williams v. Peyton, 414 F.2d 776 (4th Cir. 1969). Accord: Freeman v. Slayton, 550 F.2d 909 (4th Cir. 1976), cert. denied sub nom. Freeman v. Zahradnick, 429 U.S. 1111 (1977); Holloway v. Cox, 437 F.2d 412 (4th Cir. 1971); Young v. Boles, 343 F.2d 136 (4th Cir. 1965); Faust v. North Carolina, 307 F.2d 869 (4th Cir. 1962); Grundler v. North Carolina, 283 F.2d 798 (4th Cir. 1960).

proceeding must deny the writ if, in the state court trial, there was "some" evidence to prove each element of the offense, is too narrow in light of In re: Winship, 397 U.S. 358 (1970). See the opinion of Mr. Justice Stewart dissenting from denial of certiorari in Freeman v. Zahradnick, 429 U.S. 1111 (1977). Without greater indication that a majority of the members of the Supreme Court are prepared to extend Thompson v. City of Louisville, however, we are bound by it and do not consider whether the evidence was enough for the finder of fact to find premeditation beyond all reasonable doubt.

Jackson also attempts to attack the finding of guilt of first degree murder on the basis of an indication that the trial judge may have misapprehended the evidence.

Before the body of Mrs. Cole was found, decomposition had begun. A photograph of her body showed the presence of abrasions on portions of her body, but the autopsy report, also in evidence, clearly attributed them to rodents and insects. The judge referred to this photograph shortly before finding Jackson guilty of murder in the first degree and to the fact that she had been shot through her left breast as well as through her body. It is by no means clear, however, that the judge

found or really thought that the abrasions shown in the photograph or the shot through the breast or both proved mutilation of the body by Jackson. Even if it was clear that the finding of premeditation was based in part upon erroneous inferences from some pieces of evidence, the writ shall not be granted as long as there is some evidence to support the ultimate finding of premeditation.[3]

Complaint is also made of the trial judge's consideration of the evidence of intoxication. There was, however, a basis for a finding that Jackson was not so intoxicated as to negate a finding of premeditation, and we have no power to reconsider the bits and pieces of evidence upon which he based his ultimate finding.

Since we conclude that there was no deprivation of any due process right in the finding of guilt of murder in the first degree, we conclude that the district court erroneously ordered the writ to be issued.

This proceeding was begun with a pro se petition which raised a number of questions, some of which were not considered in the district court and are not now considered by us, for, as to them, there has been no exhaustion of state court remedies.

REVERSED.

---

3. There is no possible way to review a jury's fact-finding processes. Here, there is only a suggestion that the judge may have been partially misled in his fact-finding process.